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FEDERALISM AND TELECOMMUNICATIONS: MULTIPLICATION, DIVISION AND SHARING

BY RICHARD J. SCHULTZ*

Canada has a tradition of employing rather straightforward and unsophisticated concepts in distributing responsibilities, regulatory or otherwise, between the two levels of government. The core concepts have essentially been geographic or "territorial imperatives" with distinctions between national and local, intra-provincial and extra-provincial, routinely offered as sufficient authority to allocate responsibilities. A perfect example of the territorial catechism took place at the September 1980 conference of First Ministers on the Constitution when the Prime Minister defended the federal position on communications, on the grounds of this "clear and simple" principle: "what goes on within a province should be provincial; what is interprovincial or international should remain federal."¹ For their part, provincial premiers responded in kind by claiming jurisdiction, for example, over practically the entire telecommunications system because as "local distribution systems" they were "local undertakings". The premiers even claimed that their jurisdiction included all non-space related aspects of satellite communications.

The logic of the territorial principle can largely be traced to the original conception in 1867 that "separate yet complimentary" was the ideal to be strived for as far as relations between the two levels of government were concerned.² This can be seen in the attempt to establish exclusive lists of powers and in the highly exceptional recourse to concurrent jurisdictions. Conflict soon became characteristic in intergovernmental relations and after World War II, particularly in the last two decades, rivalry supplanted complemen-

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¹Can., "Notes for a Statement by the Prime Minister of Canada on Communications," in *Federal-Provincial Conference of First Ministers on the Constitution*, Document: 800-141039 (Ottawa: Gov't of Can., 1980).

²See Dehem, *On the Meaning of "Economic Association"* (Montreal: C.D. Howe Research Inst., 1978) at 15-18 and more generally, Smiley, *Canada in Question: Federalism in the Eighties* (3rd ed. Toronto: McGraw-Hill Ryerson, 1980). For discussions that stress exclusive responsibilities in communications see Dalfen, *Constitutional Jurisdiction over Interprovincial Telephone Rates* (1970), 2 Can. Com. L. Rev. 177 and the sources cited therein.

tarity as the cornerstone of the relationship between the governments. Today, rivalry and competition — euphemistically called interdependence — in the determination of public policies and the provision of public services, dominate intergovernmental relations. This situation is demonstrated by the routine condemnation of one level of government by the other due to “penetration” or “intrusion” into its area of jurisdiction.³ Constitutional concurrency may continue to be exceptional today but *de facto* concurrency has become the norm.

This article seeks to relate the reality of *de facto* concurrency to the debate over allocating regulatory responsibilities for the communications sector. Discussion shall be limited, however, to telecommunications, and shall not deal with the other communications sector, broadcasting. In Part I, the existing telecommunications regulatory system will be described. In Part II, there will be an examination of the principal arguments advanced to justify changing that system. Three of the major considerations that should be central to any realignment of responsibilities will be discussed in Part III. And in the final part, there will be an analysis of the two major competing proposals for jurisdictional change that have been advanced by the two levels of government; in addition, an alternative proposal will be examined.

I. THE EXISTING REGULATORY SYSTEM

Despite the prominence attached recently to the territorial principle with respect to regulation of the telecommunications system, hitherto it has been a principle much “honoured in the breach”. The existing allocation of responsibilities consists of a *mélange* of jurisdictions that defies characterization and is devoid of principle. The federal government regulates two companies operating in three provinces, one company operating on a national basis, one company providing international telecommunications services, except for those with the United States, and, finally, the domestic satellite corporation. Seven provincial governments regulate the telecommunications companies operating within their boundaries, including services provided on an inter-provincial and international basis. Two provincial governments regulate relatively small telephone companies operating solely within their provinces and one province regulates virtually no telecommunications at all. The Trans Canada Telephone System (TCTS), comprised of ten of the twelve major telecommunications carriers, establishes long distance rates and services but, as an entity, is not regulated by anyone. The interprovincial and international rates and services of the individual members are regulated by their respective regulatory authorities, federal or provincial. In other words, nine authorities regulate intra-provincial, interprovincial and international rates and services. The details of the existing allocations are found in Table I.

³ The terms “penetration” and especially “intrusion” entered the argot of Canadian intergovernmental relations with the publication of the Western Premiers’ Task Force on Constitutional Trends, *Report of the Western Premiers’ Task Force on Constitutional Trends* (Victoria: B.C. Min. of Consumer and Corporate Affairs, May 1977). See also *id.*, *Report of the Western Premiers’ Task Force on Constitutional Trends, Second Report* (Victoria: B.C. Min. of Consumer and Corporate Affairs, April 1978) and *id.*, *Report of the Western Premiers’ Task Force on Constitutional Trends, Third Report* (Victoria: B.C. Min. of Consumer and Corporate Affairs, March 1979).

II. "IF IT AIN'T BROKEN, WHY FIX IT?"

While it is evident that the "territorial principle" is violated by the existing allocation of regulatory responsibilities, it is, perhaps, of little significance. Despite the demonstrable lack of administrative and constitutional coherence, there is no serious claim that the telecommunications regulatory system has adversely affected the provision of telecommunications services in Canada. Canada has a nationally integrated system that, in terms of availability, reliability, range of services and costs, is reputed to have few equals.

TABLE I

PRINCIPAL COMPONENTS OF CANADIAN TELECOMMUNICATIONS REGULATORY SYSTEM

<i>Company</i>	<i>Regulatory Body</i>
*Alberta Government Telephones	Public Utilities Board, Alberta
*British Columbia Telephone Company	Canadian Radio-television and Telecommunications Commission (CRTC)
*Bell Canada	CRTC
CNCP Telecommunications	CRTC
*The Island Telephone Company Limited	Public Utilities Commission of Prince Edward Island
*Manitoba Telephone System	Public Utilities Board of Manitoba
*Maritime Telegraph and Telephone Company Limited	Province of Nova Scotia Board of Commissioners of Public Utilities
*The New Brunswick Telephone Company, Limited	Board of Commissioners of Public Utilities, Province of New Brunswick
*Newfoundland Telephone Company Limited	Board of Commissioners of Public Utilities, Province of Newfoundland and Labrador
*Saskatchewan Telecommunications Teleglobe	Lieutenant Governor-in-Council Minister of Communications Government of Canada
*Telesat Canada	CRTC

*Member of Trans Canada Telephone System

Given the presumed quality of the telecommunications system, it is surely incumbent on those who wish to change the regulatory system to justify such changes in terms of their impact on the provision of telecommunications services to Canadians.

The response of this article, which does indeed argue for the reordering of the regulatory system, rests on two basic contentions. First, there is no demonstrable link between the high quality development of the existing telecom-

munications system and its regulation and second, the opposite may be true in the future.⁴ Both these arguments shall be developed in turn.

Although perhaps overstated, until the last decade or so, regulation, the regulatory system and government in general were, if not irrelevant, distinctly secondary influences in the development of the telecommunications system in Canada.⁵ Certainly the claimed quality of the system was the product of industry decisions, not public policies. The system developed as it has despite, not because of, the regulatory system. For example, the principal determinant of the industry's monopoly structure was neither governmental nor regulatory but economic in nature. The various regulatory authorities took for granted the monopolistic structure of Canadian industry because it had largely evolved before there was extensive regulation. Hence, regulators did not presume that they could, or even that they should, assume a role in shaping industry structure. In arguing this, of course, it is recognized that once such a structure was challenged, as it has been in the last decade, regulators could inhibit alternatives by legitimizing and defending the structural *status quo*. We would simply observe that prior to this decade the matter was a regulatory non-issue. Similarly, regulatory authorities played a minimal role in shaping the performance objectives of the industry. In particular, value-of-service pricing and the system of cross-subsidization involved among classes of users was an industry, not government, initiative although it came to be subsequently defended on equitable rather than economic grounds. The cross-subsidization that exists within the interprovincial toll system serves as an example. When TCTS was created in 1931, the existing pricing practices were simply extended to include interregional as well as intra-regional considerations. While never officially endorsed as a matter of public policy, nevertheless, it became a *de facto* cornerstone of regulatory policy entrenched in the regulatory system.

While past developments in the telecommunications system were industry-inspired, it is contended here that the quality of the telecommunications system may increasingly be linked to the regulatory system. The recent changes in telecommunications, their implications for the regulatory system and the consequent political responses will be discussed in developing this argument.

Telecommunications has been characterized by dramatic technological and economic changes in the past four decades.⁶ We are in the midst of dynamic change of such a magnitude that it may well, as many analysts have predicted, rival the industrial revolution in its social and economic impact. Two of the driving forces behind the "information revolution" are the vast complex of technological developments and innovations in telecommunications carriage involving satellites, fibre optics, lasers, digital transmission and electronic switching, and the mergence or convergence of communications and

⁴ Although there may be some disagreement over some of the details of and criteria for this claim, it is widely accepted, most notably by the governments who have sought changes in the regulatory system.

⁵ See Schultz, *Competition as a Trojan Horse* (Discussion Paper prepared for Delta Dialogue Series Seminar No. 19, Toronto, June 23, 1981).

⁶ See, e.g., Serafini and Andrieu, *The Information Revolution and its Implications for Canada* (Ottawa: Min. of Supply and Services, 1981) and Robinson, ed., *Communications for Tomorrow* (New York: Praeger, 1978).

computers. The latter, which brings together the transformation in carriage technology with the equally important advances in computer technology and science, entails the combination of communications functions and information processing.

It is contended here that change as radical and pervasive as that which telecommunications has undergone, and continues to undergo, is seldom without its victims. In Canada, as in the United States, one of the first victims has been the regulatory system. The traditional premises of this system have been challenged and undermined. Monopoly service, end-to-end service and value-of-service pricing are no longer tenable although new premises have not yet won a comparable degree of acceptability. At present there is uncertainty as analysts and participants attempt to grapple with the new reality.

The changes in the industry have brought on two major sets of conflicts. The more immediate one pertains to alternatives to traditional telecommunications public policies, that is, *endogenous policies* (policies for telecommunications).⁸ Among the more important policies are those which must address the following issues:

- a) cross-subsidization between monopoly and competitive services;
- b) proper scope for competitive entry;
- c) distributional effects on classes of users; and
- d) effects on innovation and new services.

The resolution of these issues requires fundamental revisions and adjustments in political relationships and roles.⁹

In such a process some provinces, such as Saskatchewan and the Atlantic provinces, will lose some of the financial benefits of the existing system while others will gain. A redistribution of discretionary decision-making power is also at stake because the seven provinces now regulating telecommunications in their jurisdiction may have their discretion constrained while the three others; Ontario, Quebec and British Columbia, may have theirs expanded. This is perhaps the most intractable adjustment to be made. Given the stakes, it seems improbable that the provision of telecommunications services can be isolated or immunized from the ensuing political conflict. The quality of the telecommunications system is inextricably linked, therefore, to the resolution of the conflicts over the policies for telecommunications now central to the regulatory system.

⁷ Johnson, "Boundaries to Monopoly and Regulation in Modern Telecommunications," in Robinson, *id.* at 127-29.

⁸ The distinction between policies *for* and policies *using* (that is, between endogenous and exogenous policies) is familiar to students of Canadian transportation as it was central to the Can., *Royal Commission on Transportation (MacPherson Report)* (Ottawa: Queen's Printer, 1961). Studnicki-Gizbert has provided a more elaborate discussion in his *Regulatory Policy Options in Transport* (Toronto: U. of Toronto-York U. Joint Programme in Transportation, 1971). For an example of its employment and development in telecommunications, see Porat, "Communication Policy in an Information Society," in Robinson, ed., *supra* note 6, at 3-60.

⁹ Although the nature of the regulatory system was shaped primarily by economic forces, this is not to deny that over time this system came to entail a complex set of political adjustments and associations.

Apart from deciding on endogenous policies for telecommunications, *exogenous issues* (that is, those that address concerns pertaining to the relationships between telecommunications and other sectors of the economy and society) must also be resolved. These issues involve the use of telecommunications for the attainment of other objectives in such sectors as banking, publishing and manufacturing.

These issues have arisen largely, although not exclusively, because of the emphasis placed by the federal government on the larger role that telecommunications systems can play within society. Telecommunications has, in effect, been given a "governmental embrace" and societal interests have supplanted the traditional individual interests of subscribers and investors as the dominant governmental concern. This change in emphasis has resulted in part from the perception, influenced by the technological changes, of the telecommunications system as central to the social and economic infrastructure and, consequently, as being an instrument for the attainment of a broad range of public policies. It has also resulted from traditional Canadian concerns about foreign investment and economic independence. The federal government's preoccupation with these two aspects in establishing telecommunications policy was apparent as early as 1973, when, in its first major policy statement, it stipulated that the objectives of communications policy should be:

- a) to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
- b) to contribute to the flow and exchange of regional and cultural information;
- c) to reflect Canadian identity and the diversity of Canadian cultural and social values; and
- d) to contribute to the development of national unity.¹⁰

Other policy statements convey the same message.¹¹ What is particularly crucial is that underlying the emphasis is, as one study pointed out, a common set of "anxieties about the vulnerability of Canada to the information revolution."¹² Equally important is the concomitant belief that governmental action and control must be an integral response to the presumed threat to our economy and society.

The primacy of federal concerns for the general linkages between telecommunications and other public policy concerns and the specific linking of the information revolution and Canadian sovereignty were made manifest in the

¹⁰ Min. of Communications, Can., *Proposals for a Communications Policy for Canada* (Ottawa: Information Canada, 1973) at 3.

¹¹ See, e.g., the official statement Gov't. of Cda., *Computer Communications Policy* (Ottawa: Info Cda., 1973), where it is stated that the public policy goal is to ensure that computer/communications system evolve "in such a way as to emphasize the national identity, the achievement of major economic and social aims, both national and regional, and the maximization of Canadian influences and control over the key activities and services." (*Id.* at 3). For a full listing of other government reports that illustrate this emphasis see Serafini and Andrieu, *supra* note 6.

¹² *Id.* at 68.

various versions of the proposed *Telecommunications Act*.¹³ This legislation is the clearest, most authoritative declaration of federal priorities for telecommunications regulation. Section 3, which provides the statement of Canadian policy objectives for telecommunications, contains eighteen objectives, of which eight pertain to telecommunications. They are the following:

- a) efficient telecommunication systems are essential to the sovereignty and integrity of Canada, and telecommunications services and production resources should be developed and administered so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
- b) the radio frequency spectrum is public property that should be administered in the public interest and in accordance with international agreements and conventions to which Canada is a party;
- c) all Canadians are entitled, subject to technological and economic limitations, to reliable telecommunication services making the best use of all available modes, resources and facilities, taking into account regional and provincial needs and priorities;
- d) telecommunication links within and among all parts of Canada should be strengthened, and Canadian facilities should be used to the greatest extent feasible for the carriage of telecommunications within Canada and between Canada and other countries;
- e) telecommunications systems and services in Canada . . . should be effectively subject to Canadian control through ownership or regulation;
- f) the rates charged by telecommunications carriers for telecommunication facilities and services should be just and reasonable and should not unduly discriminate against any person or group;
- g) innovation and research in all aspects of telecommunication should be promoted in order to improve Canadian telecommunication systems and to strengthen the Canadian industries engaged in the production of broadcast programming and the manufacture of telecommunication systems and equipment; [and]
- h) the regulation of all aspects of telecommunication in Canada should be flexible and readily adaptable to cultural, social and economic change and to scientific and technological advances, and should ensure a proper balance between the interests of the public at large and the legitimate revenue requirements of the telecommunications industry.

Given the emphasis on these goals can there be any wonder why the industry is the "nervous system"! It is also interesting to note that while federal discussion papers refer to some of the issues pertaining to policies for telecommunications, the proposed legislation is virtually silent about the federal philosophy and approach to the resolution of those issues.

Although the provincial governments have not developed and articulated their approaches to these issues as extensively as the federal government, they have indicated that they too have concerns similar to those of the federal gov-

¹³ The first version of the *Telecommunications Act* was Bill C-43, 1977 (30th Parl. 2nd Sess.), given first reading in March. The second, Bill C-24, 1978 (30th Parl. 3rd Sess.), was given first reading in January and the third, Bill C-16, 1978 (30th Parl. 4th Sess.) was given first reading in November. All three versions were basically identical.

ernment.¹⁴ In fact, in many respects, provincial concerns are almost the mirror image of the federal concerns. Where the federal government emphasizes national development and identity, provincial governments concentrate on provincial or regional development and identity. Where the federal government focuses on the threats from, and vulnerability to, non-Canadian sources, provincial governments concentrate on similar concerns from other regions and centres within Canada.

It is the emphasis on the broader exogenous issues, even more than the conflicts associated with endogenous matters, that underscores the belief that the quality of telecommunications services will henceforth be inextricably linked to the resolution of conflicts arising from and fought out in the regulatory system. The endogenous issues involve a relatively narrow, albeit expanding, set of political relationships. Furthermore, although the stakes, particularly the redistributive concerns, are not insignificant, they are reasonably well defined. Consequently the political adjustments involved in the revision of telecommunications policies would appear to be the more manageable and less likely to unduly impact the telecommunications system.

Conflicts involving the exogenous goals would appear to pose greater difficulties for several reasons. Such conflicts magnify the stakes involved and, as a consequence, broaden most significantly the range of interests affected by decisions. In terms of specific issues, the "governmental embrace" of telecommunications ensures that this sector becomes inextricably embroiled in the larger arena of federal-provincial relations. Several aspects of this arena are particularly significant. First, as was indicated earlier, a successful federal attempt to secure a greatly expanded decision-making role in telecommunications would be directly at the expense of the seven provinces that now almost exclusively regulate telecommunications within their territories. This would reduce the power of the provinces at a time when they are attempting to expand them. The second aspect of telecommunications becoming bound up in the federal-provincial relations arena is that the provinces would be losing control to a national government that is widely condemned as being incapable of adequately representing the regional diversity of Canada. The third aspect is that unless one level of government secures exclusive control over the telecommunications sector, it seems inevitable, given the track record of the past decade, that competition and rivalry will ensue not only between the two levels of government but among the provinces as well, given their divergent interests and objectives. Such conflicts are often underestimated in this era of provincial "consensus" positions in federal-provincial negotiations. This leads to the final intergovernmental aspect relevant to the telecommunications sector, the absence of authoritative and effective decision-making rules to resolve intergovernmental conflicts. A decade of constitutional negotiations aptly demonstrates the absence of such rules. One of the most important consequences of this situation is that individual governments do tend to engage in unilateralism to further their particular interests.

¹⁴ See Schultz, "Partners in a Game Without Masters . . ." in Buchan *et al.*, *Telecommunications Regulation and the Constitution* (Montreal: Inst. for Research on Pub. Pol., 1982).

In short, the existing telecommunications regulatory system needs to be revised because it is doubtful that it is capable of successfully coping with, let alone resolving, the political conflicts it will confront in the eighties. Technology has eroded both the traditional premises and the associated political adjustments of the existing system. It is not, however, simply a matter of establishing new premises and forging new adjustments. In their wake, the technological forces have significantly multiplied the range of political issues that the regulatory system is called upon to handle and it is most likely that the present system will become overloaded. Should this occur, there is the potential for ensuing conflicts to affect telecommunication services in Canada. This will be the result if the regulatory system is incapable of ameliorating the federal-provincial and interprovincial conflicts and attenuating the clash of competing public policies that develop.

Before discussing some of the considerations that should inform any reordering of regulation, a fundamental objection to the preceding must be addressed. The objection, simply stated, is that the suggested solution of reordering the telecommunications regulatory system is wrongheaded. Technological forces have not only undermined the traditional regulatory system, they have called into question the very rationale for regulation of telecommunications. This position has, most notably, been advanced by Irwin, who has argued that "the technology genie is out of the bottle, never to return".¹⁵ Consequently, "market dynamics have superceded the need for regulatory protection and industry control . . .".¹⁶ Regulation should not, therefore, be reorganized but abolished.

While there is much in this argument to recommend it particularly with respect to the use of regulation for the pursuit of exogenous goals, there is no evidence that there will be much political support for it. The depiction by Irwin of governments as modern-day King Canutes attempting, but failing, to stop the tides of technology is attractive but not persuasive. It fails to recognize that, unlike Canute, governments possess more than faith; they are endowed with resources with which they can attempt to dam and divert the tides. That they may indeed fail *in the long run* does not negate the argument that governments specialize in the *short run*. At a minimum, a concern for reordering the regulatory system is relevant to a focus on short-run considerations.

III. CRITERIA FOR RESPONSIBILITY DISTRIBUTION

At the outset it was suggested that, hitherto, the core concept for distributing responsibilities between the two levels of government has been, in theory if not in practice, the "territorial principle". This principle argues that the criterion for allocation is the spatial dimension, intra-provincial or extra-provincial, of the activity. Central to this article is the assumption that such a criterion is of limited utility today if only because governmental responsibilities in the modern state are not easily containable. The decline of complementarity and the growth of competition and rivalry in intergovernmental

¹⁵ Irwin, *Technology and Telecommunications: A Policy Perspective for the 80's (Regulation Reference)*. Working Paper No. 22 (Ottawa: Economic Council of Canada, 1981).

¹⁶ *Id.* at 75.

relations reflects the limited value of such a one-dimensional approach to allocating responsibilities.

In this part three additional criteria that should help to determine the distribution of responsibilities will be discussed. The criteria are minimizing regulatory conflicts, maximizing regulatory capacity and ensuring regulatory representativeness.

A. *Minimizing Regulatory Conflicts*

A "concern about the overlapping federal and provincial regulatory jurisdictions" was one of the major reasons underlying the request from Prime Minister Trudeau to the Economic Council of Canada to undertake its "Regulation Reference".¹⁷ While any such burden has been minimal to date, an explosion of regulatory overlaps and conflicts for the telecommunications industry is anticipated. Much writing in the past has assumed that an overlap of responsibilities is harmful and should be avoided.¹⁸ Recently, some analysts, particularly those in the "public choice" school, have argued that such an emphasis is far too simplistic, that monopoly control over the provision of goods and services, or the regulation thereof, is not necessarily desirable and that duplication and overlap may be conducive to efficiency, decreased costs and public choice.¹⁹ In short, duplication and overlap are not necessarily and invariably negative and, by implication, automatically burdening.

Despite these arguments, it is still the case that overlap and duplication in the regulation of telecommunications is not desirable. This contention rests on the belief that the public choice view of duplication can be far too sanguine if those subject to regulatory overlaps have no mobility and hence no "choice". They must either attempt to satisfy two masters or cease to engage in business in one of the jurisdictions.

The type of potential regulatory overlap in telecommunications is precisely that involving one subject and two masters. This overlap may arise because most telecommunications carriers are involved in both intra-provincial and interprovincial operations; separating the two serves for accounting purposes at best. Given the differing objectives in the determination of a telecommunications policy, especially those that will develop if governments compete in the pursuit of wide-ranging goals using telecommunications, the potential regulatory burden can only be significant. Accordingly, a central criterion for assessing proposals for allocating responsibilities should be a concern for minimizing regulatory overlap and conflicts between jurisdictions.

¹⁷ The complete "Text of the Prime Minister's Letter to the Chairman of the Economic Council of Canada, July 12, 1978," is found in Appendix A of Economic Council of Canada, *Reforming Regulation* (Ottawa: Min. of Supply and Services, 1981).

¹⁸ For a useful summary of this literature see Sproule-Jones, *An Analysis of Canadian Federalism*, [1974] Publius 107.

¹⁹ See, e.g., Landau, *Redundancy, Rationality and the Problem of Duplication and Overlap* (1969), 29 Pub. Admin. Rev. 346. Sproule-Jones, *Public Choice and Federalism in Australia and Canada*, Canberra Research Monograph No. 11 (Canberra: Centre for Research on Federal-Provincial Relations, 1975).

B. *Maximizing Regulatory Capacity*

Earlier reference was made to Irwin's argument that technology had so radically transformed the telecommunications system that the capacity of regulation had been completely undermined.²⁰ While his contention that the only alternative is the abolition of regulation was noted, his concern for regulatory capacity must be addressed in any assessment of proposals for allocating regulatory responsibilities. Irwin points out that "the burden of regulation is rendered infinitely more complex" with the erosion of traditional regulatory premises.²¹ He notes that the Federal Communications Commission (FCC) has tried repeatedly to cope with the new regulatory burdens and, in particular, he cites the effort "to define, delineate and establish market boundary lines"²² in order to distinguish for regulatory purposes the areas to be regulated and those to be left to market forces. "Each attempt", he concludes, "has met with frustration as boundaries refused to remain fixed and static."²³

Similar concerns have been expressed in Canada about regulatory overload. Janisch, for example, in a recent comment on the Canadian Radio-television and Telecommunications Commission's (CRTC) decision on Bell Canada and British Columbia Telephone's rates for Trans Canada Telephone System (TCTS) related services noted that the Commission "has set itself a task whose Herculean proportions it may not have yet fully appreciated."²⁴ To support his view Janisch cited the following extract from the decision:

The Commission considers that the aggregate of revenues from TCTS services should make an appropriate contribution to meet the over-all revenue requirements of the applicants, having regard to the other sources of revenues available to them, and to the objective of maintaining reasonable levels of local and intra-company long distance rates. At the same time, the Commission considers that, in the public interest, rates for TCTS services should generally be set at levels which facilitate the flow of telecommunications across Canada. With particular reference to those TCTS services which are subject to competition, the Commission considers that these services should be offered on a compensatory basis, and that their contribution should be maximized, consistent with demand and market conditions.²⁵

What must be emphasized is that in their concern for regulatory capacity, these and other commentators have limited their discussions to the difficulties posed by the collapse of traditional regulatory approaches and the search for alternatives. The problems are compounded if governments in Canada attempt to regulate telecommunications for the attainment of a host of public

²⁰ See text accompanying note 16, *supra*.

²¹ Irwin, *supra* note 15, at 73.

²² *Id.* at 64.

²³ *Id.* at 65.

²⁴ Janisch, *The CRTC and Consistency: A Comment on the TCTS Decision* (1981), 2 C.R.R. 5-183 at 193. See also his paper with Manley Irwin in this symposium in which he refers to regulation as the "overloaded ark".

²⁵ Canadian Radio-television and Telecommunications Commission. *Bell Canada, British Columbia Telephone Company and Telesat Canada - Increases and Decreases in Rates for Services and Facilities furnished on a Canada Wide Basis by Members of the Trans Canada Telephone System*. (1981), 13 CRTC 139, 2 C.R.R. 2-216.

policy objectives rather than "simply" controlling for monopoly and anti-competitive behaviour.

Although it is impossible to set out here a full statement of the dimensions of regulatory capacity and how they would be measured, the most salient aspects can be outlined. Much of the literature on regulatory agency-industry relationships emphasizes the dominant role that the regulated come to assume in those relationships. In accounting for industry dominance, insufficient emphasis has been placed on the basic organizational forces at work although various factors have been identified.²⁶ The "organizational failures" work of Williamson and others, however, suggests that the focus be on the central role of information, the limited number of active participants and the opportunities for holders of information to manipulate its use and exploit it as a vital resource.²⁷ The result is what Williamson labels "information impactedness".²⁸ The extent to which such a state exists is perhaps the fundamental measurement of regulatory capacity. If regulatory capacity is limited and if improving regulatory performance is the goal, then the means of meeting this goal are by developing competing centres of expertise and alternative and varied sources of information. More specifically, multiple decision-makers and segmented problem-solving or division of labour are possible organizational responses for enhancing regulatory capacity.

C. *Regulatory Representation*

Although not explicitly stated or defended, this article assumes that both levels of government have legitimate interests which must be respected if there is to be a mutually satisfactory allocation of responsibilities in the telecommunications sector. An additional assumption is that given the broad range of resources that participants possess in order to pursue their claims, failure to devise satisfactory allocation will probably adversely affect the provision of services.

The federal government's interests derive in part from the "territorial principle". Inasmuch as Canada has a nationally integrated system, at a minimum the federal interest is to ensure that there are no provincial barriers that could fragment that system and to protect against actions by one province adversely impacting on others. More positively, given the significance that the telecommunications and larger information systems are assuming within our society and economy, there is undeniably a legitimate federal interest in the provision of national telecommunications services. This is not to endorse, however, the federal selection of regulation as the instrument for the attainment of national goals.

²⁶ See Mitnick, *The Political Economy of Regulation* (New York: Columbia U. Press, 1980) esp. ch. 3 and Quirk, *Industry Influence in Federal Regulatory Agencies* (Princeton, N.J.: Princeton U. Press, 1981).

²⁷ In particular see Williamson, *Markets and Hierarchies* (New York: Free Press, 1975). See also Mitnick, *supra* note 26, esp. at 206-14 and the sources cited therein and Argyris, "Ineffective Regulating Processes," in *Regulating Business: The Search for an Optimum* (San Francisco: Inst. for Contemporary Studies, 1978).

²⁸ Williamson, *supra* note 27.

While the federal government pursues national goals, the provinces have equally legitimate interests. In terms of the more specific telecommunications policies, while the provinces cannot invoke claims for "proprietary rights to the status quo",²⁹ they can claim some degree of "grandfather rights" to ensure that any changes to the system (over which seven of them have exercised almost exclusive responsibility from the beginning) are made as equitable and tolerable as possible. Furthermore, if it is legitimate for the federal government to defend its claim for jurisdiction on the basis of its fears of Canada becoming an American-dominated "terminal economy", then provincial fears of an internally biased information system are no less legitimate. The "hewers of wood, drawers of water" syndrome has long been characterized by its intra-national as well as its international variants.

Given the legitimate interests of both levels of government, it is arguable that there should be "no regulation without representation".³⁰ In other words, it is contended that a central criterion for assessing proposals for allocating responsibilities in a decision-making system must be the degree to which the legitimate interests of the respective governments are adequately represented. The concurrency of interests which binds the governments together should be reflected in a concurrency of responsibility.

IV. ALTERNATIVE PROPOSALS FOR JURISDICTIONAL ALLOCATION

Having advanced the case that the existing regulatory system may soon prove inadequate to the tasks assigned to it and having outlined several basic criteria that should be used to determine the allocation of jurisdictional responsibilities, the discussion will now turn to an assessment of three specific proposals. The first two proposals, which were advanced by the respective levels of government during the 1980 constitutional negotiations, has been central to the debate thus far; the third is a suggested alternative. The proposals shall be outlined and assessed, starting first with the government's proposals.

The federal government in 1980 proposed the following distribution of responsibilities for the telecommunications sector:

Federal Jurisdiction

- a) exclusive responsibility over national and satellite telecommunications carriers (that is, Teleglobe, Telesat and CNCP);
- b) exclusive responsibility over interprovincial and international telecommunications rates and services;
- c) exclusive responsibility over unspecified technical standards and interconnection of systems.

²⁹ The phrase is Tom Couchene's from his excellent Innis Memorial Lecture *Towards a Protected Society: The Politicization of Economic Life* (1980, 13 Can. J. of Econ. 556 at 558).

³⁰ This principle was apparently first advanced by Stanbury, "The Consumer Interest and the Regulated Industries: Diagnosis and Prescription," in Ruppenthal and Stanbury, *Transportation Policy: Regulation, Competition, and the Public Interest* (Vancouver, Centre for Transportation Studies, Univ. of British Columbia, 1976) at 139.

Provincial Jurisdiction

- a) exclusive responsibility over intra-provincial operations of "provincial" telecommunications carriers including Bell Canada, British Columbia Tel and Terra Nova Tel;
- b) exclusive responsibility for cable systems except for "national program" service and non-Canadian programming.³¹

In a subsequently amended version of this proposal the federal government suggested that a joint board be established to regulate the interprovincial rates and services of "provincial carriers". "National carriers" such as CNCP, Telesat and Teleglobe would presumably be regulated exclusively by the federal government.³²

The provincial counter-proposal which was endorsed by all the provincial governments advocated the following allocation:

Provincial Jurisdiction

- a) exclusive jurisdiction over all telecommunications works and undertakings wholly situated within a province;
- b) concurrent jurisdiction with provincial paramountcy over all other telecommunications works and undertakings;
- c) exclusive jurisdiction over cable except for broadcast networks extending to four or more provinces.

Federal Jurisdiction

- a) concurrent jurisdiction with federal paramountcy over space segment of communications satellites;
- b) concurrent jurisdiction with provincial paramountcy over all inter-provincial telecommunications carriers.³³

The provinces' position also stipulated that no provincial or federal law could disrupt the free flow of information. They proposed an arbitration device "in the event that the laws of two or more provinces conflict so as to disrupt the free flow of information" which was that a province could petition the federal Parliament "to enact a law to resolve the specific conflict".

It is apparent, then, that both governmental proposals epitomize the "territorial principle" in operation. Both would define telecommunications activities and sectors in terms of the territorial dimension and then, largely although not quite exclusively, compartmentalize governmental authority for them. The significance is not the difference in their judgment of what is intra-provincial or interprovincial — that is inevitable — but in the implicit agreement that whatever is assigned to one level is of no interest to the other (or at least of insufficient interest to justify a role for the other). The federal proposal restricts the provinces to a minimal role at the interprovincial level and significantly restricts (because of traditional relationships between inter and intra-segments) their discretion at the intra-provincial level by means of federal control over rates, services and entry at the interprovincial level. The

³¹ The full text is included in Apps. to Buchan *et al.*, *supra* note 14.

³² *Id.*

³³ *Id.*

provincial proposal is perhaps even more extreme in that the federal rôle would be even less than that which they are offered in the federal proposal. This would appear to be valid notwithstanding the provincial proposal for concurrent jurisdiction over several matters. The operative part of the provincial proposal would appear to be provincial paramountcy. Neither level of government appears willing to take more than a token acknowledgment of the legitimate interests of the other. Accordingly, both proposals fail to satisfy this article's suggested criterion of providing for effective decision-making representation of the interests of both levels of government.

The proposals do not fare much better in terms of the two other above-mentioned criteria. With respect to the concern for minimizing overlap and potential conflict, the federal proposal would create a two-tier regulatory system similar to that in the United States; a system which the United States is moving to abolish because of the conflicts it has entailed, ones which have become even more pronounced because of the development of competition in key sectors.³⁴

The provincial proposal is less problematic insofar as classic two-tier, federal-provincial regulation is concerned if only because one of the tiers, the federal one, would be very confined. On the other hand, the provincial proposal is fundamentally flawed on the overlap criterion because it fails to address the issue of conflict resolution where two or more provinces are involved. Carriers operating in more than one provincial jurisdiction would be subject to regulation by each of the provinces. Further, the provincial proposal fails to address, except in the limited case of the free flow of information clause, the issue of how the demands of the nationally integrated network would be met. There are no decision-making rules or processes for resolving interprovincial conflicts and overlaps.³⁵

The third criterion, maximizing regulatory capacity, is addressed by neither proposal. This lack of concern is not surprising. No government can be expected to show self-doubt. Nevertheless, of the two proposals, the provincial proposal fares marginally better because it allows for multiple decision-makers which may, as suggested earlier,³⁶ enhance the capacity for effective regulation. In view of the comments of Janisch³⁷ concerning the difficulties faced by the CRTC in performing within a much more limited range of responsibilities, it seems inconceivable that the task of regulating the entire field of interprovincial and international telecommunications could be handled by a single regulator — no matter how large!

In conclusion, although very generalized assessments were offered to support these judgments, it is contended here that neither the federal nor the provincial proposal provides a promising allocation of jurisdictional responsibili-

³⁴ The most recent Senate Version is found in 127 Cong. Rec. S3544-55 (daily ed. Apr. 7, 1981).

³⁵ For a discussion of this see Schultz, *Delegation and Cable Distribution Systems: A Negative Assessment*. Institute Discussion Paper No. 11 (Kingston, Ont.: Inst. of Intergovernmental Relations, Queen's U., 1981).

³⁶ See Part III, B.

³⁷ See text accompanying notes 24 and 25, *supra*.

ty. Given that the *status quo* is increasingly unacceptable, the following alternative is proposed:

Provincial

Jurisdiction over intra-provincial telecommunications works and undertakings including cable systems.

Federal

Jurisdiction over interprovincial telecommunications works and undertakings including cable systems.

On the surface, there is little that distinguishes this from the federal proposal. The underlying distinction, however, is the institutional system for exercising responsibilities.

It is proposed that the lines suggested by the federal government in 1980 be followed, but with two significant changes. The first is that federal regulatory jurisdiction be exercised by a joint federal and provincial agency. This joint board would regulate interprovincial and international rates and services, network system interconnection and network-addressing equipment matters. Thus its mandate would be larger than that proposed by the federal government, which would have exempted CNCP, Teleglobe and Telesat from the jurisdiction of the joint board.

The second and more important difference between this joint-board proposal and that of the federal government pertains to membership. The federal government's position is that it should have a majority on any joint board. Not surprisingly the provinces, to the extent that they are prepared to even contemplate such a body, have insisted on the same requirement. One proposal has suggested ten provincial and three federal members. The proposal advanced here is that the provinces would be given a majority, but only a majority of one. The advantage of such a membership ratio is that the provincial members collectively would not be in a perpetual minority position while the federal members would only nominally be so because they would not face insurmountable hurdles in persuading one provincial member to support their position. The absence of insurmountable hurdles would occur because of the diversity of provincial interests involved once one goes beyond the initial political negotiating consensus of the provinces.

In terms of the three suggested criteria, the alternative proposal fares better than the governmental proposals. By providing a mechanism for sharing responsibility for the most important aspect, interprovincial rates and services, the "no regulation without representation" criterion is respected. Although less emphasis appears to have been placed on the overlap criterion, the problems can be overcome by having provincial regulators as the representatives on the joint board. Thus, while there would be two-tier regulation, the two tiers would in effect share regulators and this should help ameliorate burdens and conflicts that result from overlap. Finally, in terms of the regulatory capacity criterion, the two-tier joint-board alternative would potentially lessen "information impactedness" by providing that multiple decision-makers all address similar problems. It would do this first by segmenting decision-making along appropriate functional lines, second by broadening the range of non-regulated participants who share similar goals and finally by making the resources of provincial regulatory agencies available through their representatives on the

joint board. This system whereby both governments divide up some of the responsibilities while sharing others appears to offer the most potential for minimizing regulatory organizational failure and thus enhancing regulatory performance.

V. CONCLUSION

A central contention of this article is that the technological changes that have fundamentally transformed the telecommunications system have had an even more profound effect on the telecommunications regulatory system. The changes have not only undermined traditional regulatory premises and eroded established political adjustments; they have also changed the nature, and increased the number, of political issues that the regulatory system must address. In this article some of the primary considerations that should determine the distribution of regulatory responsibilities between the two levels of government have been analyzed and then related to several alternative distributional proposals.

In conclusion, it appears that both the current federal and provincial governmental proposals fail because neither level of government appears willing to make anything more than a token acknowledgment of the legitimate interests of the other. Each is seeking to establish sovereign exclusive rights over telecommunications. While the specifics of their proposals are in fundamental conflict, they share a common root and a common imperative: a division of the telecommunications sector into sovereign parcels of territory.

The parties in conflict would be well advised to re-examine the forces that gave rise to the need to reorder the regulatory system. Technological change has brought about a convergence, a sharing, of the traditional roles of communications and computer systems. Economics, driven by technology, has imposed a restructuring and a realignment in the roles and relationships of the components of the telecommunications system. Carriers, most notably, are no longer capable of invoking the sovereign prerogatives that once dictated their relationships with competitors, with users and, indeed, with governments and their agents. Governments in Canada must realize that they are not immune from such change. They must accept that there is little place for the cant of sovereignty. Governments can only aspire to be partners, sharing decision-making powers with other governments, carriers and users who now can and want to make their own choices. If they refuse to share, they may be pushed aside by both internal and external actors, not to mention technological forces, and assigned a role as spectator and not as player.